Public Prosecutor v Mohd Firdaus Asren Saputra BMS Asren

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05(H)-43–01 OF 2018
MARY LIM, ZABARIAH MOHD YUSOF AND VAZEER ALAM JJCA
18 DECEMBER 2019

Criminal Procedure — Appeal — Appeal against sentence — Respondent was charged with six charges for offences relating to terrorism under Chapter VIA of the Penal Code — Respondent pleaded guilty to charges under ss 130N(b), 130J(1)(a) and (b) after 18 witnesses gave evidence — High Court convicted respondent and sentenced him to eight years imprisonment from date of arrest for each charges and sentences to run concurrently — Whether sentences imposed inadequate — Whether public interest ought to be given paramount consideration — Whether learned judge erred in deciding not to impose lengthy sentence due to the 'relatively small' amount contributed by respondent — Penal Code ss 130J(1)(a), (b) & 130N(b)

The respondent was charged with four charges under s 130N(b) of the Penal Code ('the PC'), one charge under s 130J(1)(b) of the PC and one charge under s 130J(1)(a) of the PC. All the six charges were offences relating to terrorism under Chapter VIA of the PC. After 18 witnesses had given evidence and before the close of the prosecution's case, the respondent, who was represented by counsel, changed his plea and pleaded guilty to all the six charges. The learned judge convicted the respondent and sentenced him to eight years imprisonment from the date of arrest for each of the charges and, ordered all the sentences to run concurrently. Dissatisfied with the sentence imposed, the prosecution filed the present appeal. The prosecution submitted that the learned judge had erred in failing to have regard to the gravity of the offence and that public interest ought to have prevailed over the personal mitigating considerations articulated and relied on by the respondent.

Held:

(1) These offences were, without doubt very serious offences. The respondent had yielded four times to the appeal for monetary contributions for Islamic State. The total sum of RM2,400 contributed by the respondent should not be viewed to be insubstantial. Therefore, the court could not agree with the learned judge that because the amount was 'relatively small', a lengthy sentence should not be imposed (see paras 23, 29 & 31).

(2) Based on the nature of the offences for which the respondent was charged and for which he had pleaded guilty and the facts that the respondent had

changed his plea only after 18 witnesses had been called, there was very little allowance, if any, that may be given for the circumstances of the individual. The very nature of these offences brought terror and fear to the general public, the extent and degree of violence brought by such terrorist acts was unfathomable, and the sentence meted out for the six charges must reflect that approach and attitude of the court (see para 36).

(3) In offences under ss 130J and 130N of the PC, the protection and safeguarding of the public was paramount and the length of sentence imposed must reflect that object. In the present case, the learned judge had failed to impose a sentence that was adequate having regard to all the facts as disclosed and for the reasons as set out above (see para 37).

(4) With regards to the trend of sentencing of similar offence, the closest in circumstances would be the case of *Public Prosecutor v Jonius Ondie @ Jahalie* where a ten year imprisonment was imposed where the accused changed his plea after eight witnesses had testified (see paras 39–40).

(5) From the submissions of both counsel, the totality of evidence, the change of plea, the public interest and the severity of the offence and for the reasons already discussed, the court found that there was appealable error in the exercise of discretion in respect of the punishment that was meted out. The court held that a sentence of ten years imprisonment from the date of arrest for each of the charges to run concurrently was adequate and appropriate (see para 41).

[Bahasa Malaysia summary

Responden telah dituduh dengan empat pertuduhan di bawah s 130N(b) Kanun Keseksaan ('KK'), satu pertuduhan di bawah s 130J(1)(b) KK dan satu pertuduhan di bawah s 130J(1)(a) KK. Kesemua enam pertuduhan tersebut adalah kesalahan yang berkaitan dengan kegiatan pengganas di bawah Bab VIA KK. Setelah 18 saksi memberikan keterangan dan sebelum penutupan kes pendakwaan, responden, yang diwakili oleh peguam, mengubah pengakuannya dan mengaku bersalah atas keenam-enam pertuduhan tersebut. Hakim yang bijaksana mensabitkan responden dan menjatuhkan hukuman penjara lapan tahun dari tarikh penangkapan bagi setiap pertuduhan dan, memerintahkan agar semua hukuman berjalan serentak. Tidak berpuas hati dengan hukuman yang dijatuhkan, pihak pendakwaan mengemukakan rayuan semasa. Pihak pendakwaan menghujahkan bahawa hakim yang bijaksana telah terkhilaf karena tidak mengambil kira keseriusan kesalahan tersebut dan bahawa kepentingan awam seharusnya mengatasi pertimbangan mitigasi peribadi yang dinyatakan dan disandarkan oleh responden.

Diputuskan:

(1) Kesalahan ini adalah, tanpa keraguan, kesalahan yang sangat serius. Responden telah menuruti sebanyak empat kali terhadap rayuan bagi

mendapatkan sumbangan wang untuk 'Islamic State'. Jumlah keseluruhan wang sebanyak RM2,400 yang disumbangkan oleh responden tidak boleh dianggap tidak penting. Oleh itu, mahkamah tidak dapat bersetuju dengan hakim yang bijaksana bahawa kerana jumlahnya 'agak kecil', hukuman yang panjang tidak boleh dijatuhkan (lihat perenggan 23, 29 & 31).

(2) Berdasarkan sifat kesalahan yang dipertuduhkan ke atas responden dan yang dia telah mengaku bersalah dan fakta bahawa responden telah menukar pengakuannya hanya setelah 18 saksi dipanggil, terdapat sedikit peruntukan, jika ada, yang boleh diberikan bagi keadaan individu. Sifat kesalahan ini sahaja telah membawa keganasan dan ketakutan kepada masyarakat umum, tahap keganasan yang dibawa oleh tindakan pengganas tersebut tidak dapat dibendung, dan hukuman yang dijatuhkan bagi enam pertuduhan tersebut mesti menggambarkan pendekatan dan sikap mahkamah (lihat perenggan 36).

(3) Dalam kesalahan di bawah ss 130J dan 130N KK, perlindungan dan penjagaan keselamatan awam adalah yang terpenting dan tempoh hukuman yang dijatuhkan mesti menggambarkan objektif tersebut. Dalam kes semasa, hakim yang bijaksana gagal menjatuhkan hukuman yang memadai dengan mengambil kira semua fakta seperti yang dikemukakan dan dengan alasan seperti yang dinyatakan di atas (lihat perenggan 37).

(4) Berkenaan dengan 'trend' menjatuhkan hukuman yang serupa, keadaan di dalam kes yang hampir serupa dengan keadaan kes semasa adalah kes *Public Prosecutor v Jonius Ondie @ Jahalie* di mana hukuman penjara sepuluh tahun dikenakan di mana tertuduh mengubah pengakuannya setelah eight saksi memberi keterangan (lihat perenggan 39–40).

(5) Berdasarkan hujahan peguam bagi kedua-dua pihak, keseluruhan keterangan, perubahan pengakuan, kepentingan umum dan keseriusan kesalahan dan atas alasan yang telah dibahas, mahkamah mendapati bahawa terdapat kekhilafan yang boleh dirayu dalam pelaksanaan budi bicara berkenaan dengan hukuman yang dijatuhkan. Mahkamah memutuskan bahwa hukuman penjara sepuluh tahun dari tarikh penangkapan bagi setiap pertuduhan yang dijalankan serentak adalah memadai dan sesuai (lihat perenggan 41).]

Cases referred to

Azizi bin Abdullah v PP (W-05(SH)-218–05 of 2017) (unreported), CA (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83, FC (refd)
Chang Liang Sang & Ors v PP [1982] 2 MLJ 231, FC (refd)
Mohamad Nasuha bin Abdul Razak v PP (W-05(H)-404–09 of 2017) (unreported), FC (refd)

Pendakwa Raya lwn Imam Wahyudin bin Karjono dan satu lagi dan kes-kes lain [2017] 10 MLJ 582, HC (refd)
Pendakwa Raya v Mohd Haniffa bin Syedul Abbar [2016] MLJU 1270, HC (refd)
PP v Bukhori bin Che Noor (45SO-40–03 of 2017) (unreported), HC (refd)
PP v Bukhori bin Che Noor (45SO-69–04 of 2017) (unreported), HC (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Mohamed Nor & Ors [1985] 2 MLJ 200b, SC (refd)
PP v Muhammad Kasyfullah bin Kassim [2016] 6 MLJ 567; [2017] 1 CLJ 63, CA (refd)
PP v Yazid bin Sufaat & Ors [2015] 1 MLJ 571; [2014] 2 CLJ 670, CA (refd)

Legislation referred to

Anti-Money Laundering, Anti- Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 66B, 66D
Penal Code ss 130G(a), 130J, 130J(1)(a), (1)(b), 130N, 130N(b), 130O, 130O(1)(b), 130Q(1), 304(a), Chapter VIA

Appeal from: Criminal Trial Nos BKI-45SO-6/2 of 2017 and BKI-45SO-7/2 of 2017 (High Court, Kota Kinabalu)

Nik Syahril bin Nik Ab Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Azhier Farhan (Azhier Arisin & Co) for the respondent.

Mary Lim JCA:

INTRODUCTION

[1] A total of six charges for offences relating to terrorism under Chapter VIA (Offences relating to Terrorism) of the Penal Code (Chapter VIA) were brought against the respondent in two cases (BKI-45SO-6/2 of 2017 and BKI-45SO-7/2 of 2017). After 18 witnesses had given evidence and before the close of the prosecution's case, the respondent, who was represented by counsel, changed his plea and pleaded guilty to all six charges. The learned judge convicted the respondent and sentenced him to eight years imprisonment from the date of arrest for each of the charges and, ordered all the sentences to run concurrently. The prosecution being dissatisfied with the sentence, appealed.

[2] After having heard learned DPP and learned counsel for the respondent accused, and upon a full and careful consideration of the grounds of decision, the records of appeal and the totality of evidence, we unanimously allowed the appeal after finding the sentence imposed by the learned judge to be manifestly inadequate. Having regard to the respondent accused's change of plea, the element of public interest and the fact that these are security offences as well as

the principles of sentencing, we were of the unanimous view that a sentence of ten years from the date of arrest for each of the charges on appeal to run concurrently is adequate and we so ordered.

THE SIX CHARGES

[3] The charges against the respondent in Case No BKI-45SO-6/2 of 2017 are as follows:

Charge 1

Bahawa kamu pada 30.04.2016 jam lebih kurang 3.50 p.m. di Maybank Cawangan Karamunsing, No. 1, Lorong Kemajuan, Karamunsing, dalam daerah Kota Kinabalu, dalam negeri Sabah, telah secara tidak langsung memberikan wang sebanyak RM600.00 kepada Bukhori bin Che Noor melalui akaun Maybank bernombor 1571660894675, yang mana kamu mempunyai sebab yang menasabah untuk mempercayai bahawa harta itu akan digunakan, secara keseluruhan atau sebahagian, untuk melakukan perbuatan pengganas, dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 130N(b) Kanun Keseksaan.

Charge 2

Bahawa kamu pada 01.04.2016 jam lebih kurang 4.16 p.m. di Maybank Cawangan Putatan, Ground and First Floor, Lot 10 & 11, Putatan Square Phase II, Lorong Putatan 1, Putatan, dalam daerah Kota Kinabalu, dalam negeri Sabah, telah secara tidak langsung memberikan wang sebanyak RM600.00 kepada Bukhori bin Che Noor melalui akaun Maybank bernombor 1571660894675, yang mana kamu mempunyai sebab yang menasabah untuk mempercayai bahawa harta itu akan digunakan, secara keseluruhan atau sebahagian, untuk melakukan perbuatan pengganas, dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 130N(b) Kanun Keseksaan.

Charge 3

Bahawa kamu pada 02.06.2016 jam lebih kurang 11.16 p.m. di Maybank Cawangan Lapangan Terbang Antarabangsa Kota Kinabalu, Lot L1 L22, Terminal 1, Lapangan Terbang Antarabangsa Kota Kinabalu, dalam daerah Kota Kinabalu, dalam negeri Sabah, telah secara tidak langsung memberikan wang sebanyak RM600.00 kepada Bukhori bin Che Noor melalui akaun Maybank bernombor 1571660894675, yang mana kamu mempunyai sebab yang menasabah untuk mempercayai bahawa harta itu akan digunakan, secara keseluruhan atau sebahagian, untuk melakukan perbuatan pengganas, dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 130N(b) Kanun Keseksaan.

Charge 4

Bahawa kamu pada 30.06.2016 jam lebih kurang 10.18 p.m. di Maybank Cawangan Karamunsing, No. 1, Lorong Kemajuan, Karamunsing, dalam daerah Kota Kinabalu, dalam negeri Sabah, telah secara tidak langsung memberikan wang sebanyak RM600.00 kepada Bukhori bin Che Noor melalui akaun Maybank bernombor 1571660894675, yang mana kamu mempunyai sebab yang menasabah

untuk mempercayai bahawa harta itu akan digunakan, secara keseluruhan atau sebahagian, untuk melakukan perbuatan pengganas, dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 130N(b) Kanun Keseksaan.

[4] The two charges against the respondent in Case No BKI-45SO-7/2 of 2017 are as follows:

Charge 1

Bahawa kamu pada 30.03.2016 jam lebih kurang 11.32 pagi di No.102, Kampung Contoh Petagas, dalam daerah Putatan, dalam negeri Sabah, dengan pengetahuan telah memberi sokongan kepada Kumpulan Pengganas Islamic State dengan cara berbaiah kepada kumpulan pengganas tersebut melalui aplikasi telegram di dalam kumpulan perbualan 'gagak hitam' (social group id no. 146761651) dengan menggunakan nama ID 'pejuang tauhid', dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 130J(1)(b) Kanun Keseksaan.

Charge 2

Bahawa kamu pada 28.06.2016 jam lebih kurang 3.41 pagi hingga jam lebih kurang 4.27 pagi di No. 102, Kampung Contoh Petagas, dalam daerah Putatan, dalam negeri Sabah, dengan pengetahuan telah memberi sokongan kepada perbuatan pengganas yang melibatkan penggunaan bahan letupan melalui aplikasi telegram di dalam kumpulan perbualan 'amanah(phb) vs pas' (social group id no. 143486835) dengan menggunakan nama ID 'pejuang tauhid', dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 130J(1)(a) Kanun Keseksaan.

STATEMENT OF FACTS AND SENTENCE

[5] Upon the respondent's plea of guilty to the six charges, the following statement of facts was admitted by the respondent — see exh P72 at pp 999–1008 of the record of appeal. Those undisputed facts are summarised as follow.

[6] On 25 March 2016, the respondent accused was added to an online chat group called 'gagak hitam' by one Muhummad Wandy bin Mohamed Jedi aka 'Wanndy' or 'Akhi Wandy' (now deceased), using the respondent accused's mobile phone number. Wanndy was believed to be in Syria at that material time. That chat group had 66 members. Wanndy subsequently added the respondent to another chat group known as 'amanah (pbh) v pas'. This second chat group had 44 members. Both chat groups were operated using the 'Telegram' application. The user name of the respondent in both chat groups was the same, that is, 'pejuang tauhid'.

[7] On 30 March 2016 at around 11.32am, the respondent declared allegiance to the terrorist entity known as Islamic State (IS) in the 'gagak hitam' chat group, reciting an oath known in Arabic as 'Bai'yah'. This 'oath of allegiance' is the subject matter of the first charge in BKI-45SO-6/2 of 2017.

[8] On 28 June 2016, Wanndy who was then operating somewhere in Syria posted on the 'amanah (pbh) v pas' chat group announcing to the members that a pub known as 'Movida' in Petaling Jaya had been bombed. The respondent responded to Wanndy's posting, making three comments on 28 June 2016 at 4.22am, 4.23am and at 4.26am. The first comment was 'alamak ... dah ter like hehe ... Serangan guna apa akhi?'; the second which was a response to Wanndy's posting of 'guna bom tangan je, tp dorg nmpk ada kafir cina yg tumbang ha ha' was 'Alhamdulillah ...'. The third comment in response to Wanndy's posting that 'msti ada yg tumbang' was 'Harap jumlah yg mampos tu ramai ...'. These three comments are the subject matter of the second charge in BKI-45SO-7/2 of 2017.

[9] Wanndy had also sought for monetary contributions (*infaq* in Arabic) to assist members of the Islamic State organisation in Syria. Monetary contributions were told to be paid into the bank account of one Bukhori bin Che Noor. The respondent responded to these requests, making four separate contributions of RM600, on 1 April 2016 at 4.16pm, 30 April 2016 at 3.50pm, 2 June 2016 at 11.16pm and on 30 June 2016 at 10.18pm. These monetary contributions by the respondent are the subject matter of the remaining four charges.

[10] All the conversations in the two chat groups were noted down and kept by a member who then reported to the police. The respondent was arrested on 18 July 2016 at around 9.45pm and his mobile phone was seized. A bank slip dated 1 April 2016 for the sum of RM600 was also found on the respondent revealing that the respondent had deposited money to Bukhori bin Che Noor. CCTV recordings at the bank were also tendered in evidence.

[11] The 'bai'yah' taken by the respondent was referred to Ahmad El-Muhammady bin Muhammad Uthman El-Muhammady, an expert in terrorism analysis, from the International Islamic University of Malaysia. In his expert report on the analysis tendered at the trial of the respondent, the expert opined that 'Bai'yah' is an oath of allegiance and loyalty to a leader (*emir*); and in the instant case, the oath of allegiance taken by the respondent amounted to expressing support for the Islamic State.

[12] Bukhari bin Che Noor was subsequently charged on 10 April 2017 with the offence of making financial service available for terrorist purposes under s 130O of the Penal Code and was sentenced to seven years imprisonment from

the date of his arrest on 30 June 2016. Vide *gazette* notification dated 12 November 2014 (PU(A) 301), 'Islamic State' was declared a terrorist organisation under ss 66B and 66D of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFA 2001').

[13] As mentioned at the outset, the respondent changed his plea more than mid-way through the prosecution's case. The statement of facts were tendered and marked as exh P7 followed by submissions on mitigation. Learned counsel for the respondent focused on the personal circumstances and nature of the offences charged, the personal circumstances being:

(a) the respondent, married with three children, was 34 years at the time of the commission of the offences in question;

(b) despite his humble background, the respondent managed to educate himself and had obtained a degree in architecture;

(c) at the time of arrest, the respondent was running a successful car rental business; and

(d) the respondent was a first offender without any previous criminal record.

[14] As for the four charges of transmitting money for the use of Malaysians in Syria who were with the Islamic State organisation, the respondent claimed naivety and innocence, that he was not aware of the potential use of the monies for terrorist activities. On the allegiance to the Islamic State, he claimed that he merely cut and pasted the words of the 'bai'yah' on the chat group without understanding its significance. As for his expressions of support for the bombing of the Movida pub, the respondent claimed to be a generally inactive member of the group and had never participated in violent acts, and that he had no plans to go to Syria to join the Islamic State terrorists.

[15] The learned DPP had prayed for a deterrent sentence, pointing out that the respondent only pleaded guilty after 18 witnesses had been called. The court was also invited to consider the public interest element. A list of unreported cases concerning similar or same offences was produced to the court. Those persons had also participated in the same two chat groups as the respondent.

[16] After hearing submissions on mitigation, 'after taking into account all the personal circumstances of the accused, the nature of the crime, interest of the public and importance of the rehabilitation aim in this type of cases', the learned judge sentenced the respondent to eight years imprisonment on each of the six charges in the said two cases and further ordered the sentences to run

concurrently from the date of arrest. The reasons for the sentence can be seen at paras 23–35 of the grounds of judgment and can be summarised as follows:

(a) being mindful that the maximum punishment is 30 years and minimum is seven years for the charges under s 130N(b);

that the offences were recently drafted by Parliament to meet the threat posed by international terrorist organizations such as the Islamic State;

(b) by comparison, the offence of committing culpable homicide not amounting to murder under s 304(a) of the Penal Code where a human life has been taken, is punishable with the maximum term of imprisonment of 30 years;

(c) a lengthy term of imprisonment which has some bearing to the maximum term of imprisonment of 30 years would be more suitable for repeat offenders or those who had given material support to terrorist acts beyond making gleeful comments;

(d) while the respondent cannot feign ignorance that the money given would not be potentially used for terrorist acts, the amount given is relatively small;

(e) in the present case, the expression of support and declaration of allegiance were all made online;

(f) although wrong in that it has the potential of influencing others to commit actual terrorist acts, a lengthy period of incarceration was seen to be counterproductive to the rehabilitation process; and

(g) while the respondent had pleaded guilty only after many witnesses had testified for the prosecution, the court was nevertheless of the view that given the fact that the respondent is a first offender and had shown remorse for his crime, some credit still ought to be given for his plea of guilty.

THE APPEAL BEFORE US

[17] The learned prosecution appealed arguing that the learned judge erred in law and in fact:

(a) in passing sentences that did not reflect the public interest, the rampancy and high risk and threat to the security of the nation;

(b) in failing to find that criminal offences committed by the respondent is prevalent amongst the public in giving support to the Islamic State despite numerous and enhanced measures by authorities to combat the crime;

(c) in imposing sentences which were manifestly inadequate when compared to the maximum sentence provided under ss 130N(b) and 130J(1)(a) and (1)(b) of the Penal Code;

(d) in giving emphasis to the respondent's interest instead of the public interest;

(e) in finding that the role and involvement of the respondent did not qualify him to be imprisoned for a long period;

(f) in holding that the amount of money was small and should not be a basis for lengthy imprisonment of the respondent; and

(g) that the respondent had claimed trial and had only changed his plea to one of guilty after 18 prosecution witnesses had testified.

[18] The learned DPP further emphasised the seriousness of the offence, citing several high and relevant authorities in this regard, and that the sentences meted out did not reflect the seriousness of the offences. Comparison with other similar cases were then made.

[19] Learned counsel for the respondent contended otherwise, urging this court to dismiss the appeal for the following reasons:

(a) that the learned judge was mindful and had considered the element of public interest;

(b) that the complaint of rampancy had not been mounted by the prosecution;

(c) that the sentence was adequate having regard to the role played by the respondent;

(d) having regard to the reformative and rehabilitative aspects of sentencing and since the respondent did not directly aid in the commission of violent acts, the door should be open for the respondent to return to society as soon as he is rehabilitated; and

(e) that the respondent pleaded guilty after eight witness had testified.

OUR DECISION

[20] It was particularly impressed upon us that the learned judge had erred in failing to have regard to the gravity of the offence and that public interest ought to have prevailed over the personal mitigating considerations articulated and relied on by the respondent. Those mitigating factors being that he had conceded that the offence committed was of a serious nature; that he was a sole breadwinner for his family and that he was a first offender, and the several other considerations mentioned earlier.

[21] Having carefully considered the evidence, the record of appeal, the reasoning of the learned judge and the submissions of both learned counsel, we agreed with the learned DPP.

[22] Section 130N(b) and 130J(1) of Chapter VIA of the Penal Code read as follows:

> 130N Providing or collecting property for terrorist acts
>
> Whoever, by any means, directly or indirectly, provides or collects or makes available any property intending, knowing or having reasonable grounds to believe that the property will be used, in whole or in part, to commit a terrorist act shall be punished —
>
> (a) if the act results in death, with death; and
>
> (b) in any other case, with imprisonment for a term of not less than seven years but not exceeding thirty years, and shall also be liable to a find, and shall also be liable to forfeiture of any property so provided or collected or made available.
>
> 130J Soliciting or giving support to terrorist groups or for the commission of terrorist acts
>
> (1) Whoever knowingly and in any manner solicits support for, or gives support to —
>
> (a) any terrorist group; or
>
> (b) the commission of a terrorist act,
>
> shall be punished with imprisonment for life or imprisonment for a term not exceeding thirty years or with fine, and shall also be liable to forfeiture of any property used or intended to be used in connection with the commission of the offence.

[23] First, is the nature of the offence. These offences are, without doubt very serious offences. This court has in *Public Prosecutor v Muhammad Kasyfullah bin Kassim* [2016] 6 MLJ 567; [2017] 1 CLJ 63 and *Public Prosecutor v Yazid bin Sufaat & Ors* [2015] 1 MLJ 571; [2014] 2 CLJ 670 recognised that aspect. In *Public Prosecutor v Muhammad Kasyfullah bin Kassim* where the same offence was considered, the Court of Appeal alluded to the same terrorist activities which are related to and form the subject matter in this appeal, that 'the terrorist activities had happened on our own backyard when the Movida club in Puchong was attacked ... If the terrorist acts are not snip during its embryonic stage, it will definitely cause a serious threat to the peace and security of this country'. The Court of Appeal further stated:

> [20] The gist of the offence against the respondent is his involvement in the jihadist, militant movement of the IS. Its movement has been characterized by extreme violence and suicide bombings. It is a menace to the international community and its threat and extremist religious ideologies are no exception to Malaysia, which has

a population of about 31 million, and 60 percent are Muslims. It is believed that there are now about 200–250 IS fighters from Malaysia in the Middle East such as Syria, Iraq and Turkey. One of the IS militant leaders based in Syria is a young Malaysian, Muhammad Wanndy Mohamed Jedi. He was responsible to orchestrate and direct the attacks in Malaysia. According to an article entitled 'Malaysia: Clear and Present danger from the Islamic State' by James Chin — Wednesday, December 16, 2015, there was a meeting between the militant group of the IS, Abu Sayyaf and the Moro National Liberation Front (MNLF) in Sulu. At the meeting, several resolutions were passed, including the attacks in Malaysia, in particular Kuala Lumpur and Sabah. This chilling information shocked us and the foreigners living in Malaysia. Indeed the first attack by the militant in Malaysia was the grenade attack at the Movida Club in Puchong, Selangor on 28 June 2016. In this early hours attack, it targeted the members of the public who watched Euro football 2016. We are mindful that the charge against the respondent was between the years 2013–2014. The IS militant attack is serious and real. The threat by the IS militant in this country was never appreciated and considered by the trial judge. His Lordship was satisfied that the respondent had ceased his ties with the IS, he felt remorse and promptly returned to Malaysia. He was arrested a few months later after returning from Syria, by then his was 'stale' is a spent force, so to speak. In other word, he was a reformed IS militant. That may be so, but we must bear in mind that the IS militants are fighting a religious war. They are die-hard fighters who are extremely difficult to deradicalise as the English idiom says 'a leopard never changes its spots.

[24] In *Public Prosecutor v Yazid bin Sufaat & Ors*, the accused was charged for committing a security offence under s 130G(a) of Chapter VIA of the Penal Code, namely for promoting the commission of an act of terrorism. The Court of Appeal there described the act of terrorism in strong and uncompromising terms:

[23] An act of terrorism is a transnational phenomenon. It has no territorial limits. It transcends national borders. For instance, an act of terrorism may be planned or hatched within Malaysia with an intention to execute it outside Malaysia ...

[25] The penalty under s 130N(b) carries a minimum term of imprisonment of seven years while the penalty under s 130J(1)(a) and (1)(b) is imprisonment for life or imprisonment for a term not exceeding 30 years.

[26] In this appeal, the respondent has admitted to all six charges. He has thus admitted to the four charges of directly or indirectly, providing or collecting or making available any property intending, knowing or having reasonable grounds to believe that the property will be used, in whole or in part, to commit a terrorist act, an offence under s 130N. He has also admitted to knowingly and in any manner soliciting support for, or giving support to the Islamic State organisation, and to the commission of a terrorist act, offences under s 130J(1)(a) and (1)(b) of the Penal Code.

A **[27]** We are prepared to accept that the learned judge was mindful of the nature of the offences, that from the widely worded terms of s 130J(1)(a) and (1)(b), the intention of Parliament is 'to criminalize a wide range of behavior that could potentially give any 'manner' of support or encouragement to terrorist acts' as falling within the terms of s 130J; that 'an online act of 'liking' a terrorist act committed in another corner of the world or expressing support for such acts in secret online chat groups would fall within the ambit of the offence creating provision'. The learned judge recognised too, that the respondent's argument that he had merely chatted in cyberspace without any intention of picking up weapons and committing terrorist acts 'cannot negate the elements of the offence in question or provide justification to plead for a token punishment'. At the same time, the learned judge opined that 'merely because the maximum punishment is 30 years imprisonment ... does not necessarily mean that the act of expressing support for a terrorist act while chatting online must be visited with a lengthy term of incarceration'. Coupled with the views on the reformative and rehabilitative aspects of sentencing, the plea of guilty and the fact that the respondent had shown remorse and was a first offender led the learned judge to impose concurrent term of eight years on each of the charges.

[28] In our view, that concurrent sentence of eight years is manifestly inadequate and unsuitable to the proved aggravating facts and circumstances as opined in *Public Prosecutor v Mohamed Nor & Ors* [1985] 2 MLJ 200b, *Chang Liang Sang & Ors v Public Prosecutor* [1982] 2 MLJ 231 and *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83.

[29] The minimum sentence for providing or collecting property for terrorist acts in s 130N(b) is seven years. The respondent had admitted that his acts of transferring the total amount of RM2,400 directly into the bank account of one Bukhori bin Che Noor on the dates alleged were acts done knowingly or having reasonable grounds to believe that the money he had transferred used, in whole or in part, was to commit a terrorist act. In our view, the sum should not be viewed to be insubstantial. It must be considered against the full circumstances as adduced by the prosecution.

[30] The respondent is a well-educated individual with a degree in architecture. He is familiar with the use of online chats, joining two such groups in this appeal. The appeal records show that he was committed to the cause as reflected by the oath of allegiance (*bai'yah*) where he had sworn loyalty to a leader. He had also expressed support for the Islamic State organisation, an organisation which has been *gazetted* as a terrorist organisation under ss 66B and 66D of the AMLATFA 2001. His provision of financial support by whatever description is nevertheless a response consistent with his oath of allegiance and more significantly, in response to the appeal by Wanndy in both

chat groups for monetary contributions. And, the respondent gave those monetary contributions no less than four times before he was arrested.

[31] Such conduct contradicts the respondent's claim of innocence and naivety, of his unawareness that the monies would be used for terrorist activities. While the respondent may have no plans to go to Syria to join the terrorists there, he was equally involved and culpable of the offences as charged. In fact, the learned judge had ruled that the respondent cannot feign ignorance that the monies would not be potentially used for terrorist acts; and we fully agree. What we do not however, agree with the learned judge was that because the amount was 'relatively small', a lengthy sentence should not be imposed. The respondent yielded four times to Wanndy's appeal for monetary contributions.

[32] The respondent's responses to the bombing of the Movida club at Puchong, Selangor further confirmed the above conclusions. The respondent applauded that heinous and cowardly event, wishing that there were many more victims. The learned judge was in no doubt that the respondent's act came within the ambit of the widely worded s 130J(1); and we are in full agreement.

[33] But where we depart from His Lordship is where he held that there was no evidence of the respondent having prior knowledge of the reprehensible act. There is no such requirement for a conviction under s 130J(1). All that is required is knowingly and in any manner give support to any terrorist group or to the commission of any terrorist act. The respondent has admitted to the charge under s 130J(1), that he had given support to the terrorist group who had bombed the Movida club, as reflected by his exchange with Wanndy.

[34] We take into consideration the emergence of the social media as a tool to disseminate information and in this case, to, inter alia, extend the influence of IS or Daesh. The article, 'Daesh: Kebangkitan dan Pengaruh Media Sosial' published in the Malaysian Journal of Communication *Jld* 32(2) 2016, pp 381–404 is of material relevance and must be given serious consideration:

> Abad ke 21 menyaksikan video dan media sosial menjadi senjata perangsaraf terbaru kumpulan militan untuk membina pengaruh, pengrekrutan dan mengukuhkan ideologi mereka di rantau ini. Selain itu, video dan media sosial juga digunakan sebagai instrumen untuk membuat ancaman terhadap negara- negara yang tidak bersetuju dengan kewujudan mereka. Penggunaan video dan media sosial secara profesional oleh kumpulan militan ini adalah satu fenomena baru. Kesannya, Malaysia kini di ambang kebimbangkan ekoran ancaman demi ancaman dari kumpulan militan Asia Tenggara seperti Daesh yang mahir menggunakan teknologi maklumat untuk memenangi peperangan ideologi. Walaupun keadaan masih terkawal namun langkah keselamatan ketat sentiasa menjadi keutamaan kerajaan Malaysia. Kajian ini melaporkan bentuk keupayaan kumpulan militan Daesh dalam melancarkan perangsaraf menggunakan video dan media sosial ke atas

rakyat dan kerajaan Malaysia untuk dua tujuan berbeza iaitu pengaruh dan ancaman. Walaupun jelas kerajaan menguasai keseluruhan agensi berita dan media arus perdana, namun penyebaran maklumat dalam bentuk video di media sosial menjadi cabaran baru kepada Malaysia.

[35] The threat and presence of IS in Malaysia is very real and must be given serious regard by the court. As opined by the Federal Court in *Chang Liang Sang & Ors v Public Prosecutor*, we are of the view that the sentence meted out must also reflect the court's concern for the public interest, the public's safety and to protect the public against the harm and terror of IS and terrorism, as was the case of drug trafficking:

> We considered the appeal against sentence. In that respect we would like to stress that in drug trafficking cases very little allowance can be made for the circumstances of individual offenders. We had said enough in *Loh Hock Seng & Anor v Public Prosecutor* and similar cases. A study of these cases indicates the strong concern of his court that as far as possible in this difficult area of sentencing there should be reasonable conformity in the sentences imposed in similar cases. Other than in the most exceptional circumstances, a sentence of death should be imposed following a conviction for trafficking, in order to mark the gravity of the offence, to emphasis public disapproval, to serve as a warning to others, to punish the offenders and most of all to protect the public.

[36] The nature of the offences for which the respondent is charged and for which he had pleaded guilty, changing his plea only after 18 witnesses had been called, require this court to state equally that there is very little allowance, if any, that may be given for the circumstances of the individual. The very nature of these offences bring terror and fear to the general public, the extent and degree of violence brought by such terrorist acts is unfathomable, and the sentence meted out for the six charges must reflect that approach and attitude of the court. As was held in *Public Prosecutor v Muhammad Kasyfullah bin Kassim*, having regard to the facts and circumstances of the case, in particular the factor of the public interest where Malaysia has most unfortunately become a primary target location for IS terrorist attacks and recruitment, we too cannot compromise with the terrorism activities of IS. The sentence must not be a 'tap on the wrist'.

[37] While the reformative and rehabilitative elements of incarceration are acknowledged, these considerations are already inherent in the role and purpose of imprisonment. In offences under ss 130J and 130N, the protection and safeguarding of the public is paramount and the length of sentence imposed must reflect that object. In this appeal, we find that the learned judge has failed to impose a sentence that was adequate having regard to all the facts as disclosed and for the reasons as set out above.

[38] The principles on sentencing are well established as are the principles

for appellate intervention in this regard. What has been oft cited in *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 merits repeating:

> The principles to be applied in imposing sentence however are the same in every case. The High Court in exercise of its revisionary powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles in the assessment of the sentence. It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence.

[39] Further, is the matter of the trend of sentencing on similar offence. A list was produced by the learned DPP, and we find the list helpful:

No	Case	Offence	Sentence	Remarks
1.	Public Prosecutor v Bukhori bin Che Noor 45SO-40–03 of 2017 (HC)	s 130O(1)(b) (financial service)	Seven years imprisonment from the date of arrest	PG at first instance
2.	Public Prosecutor v Bukhori bin Che Noor 45SO-69–04 of 2017 (HC)	s 130J(1)(a) (*Bai'ah*, telegram)	Seven years imprisonment from the date of arrest	PG at first instance
3.	Public Prosecutor v Bukhori bin Che Noor 45SO-69–04 of 2017 (HC)	s 130J(1)(a) (support, telegram)	Seven years imprisonment from the date of arrest	PG at first instance
4.	Pendakwa Raya v Mohd Haniffa bin Syedul Abbar [2016] MLJU 1270 (HC)	s 130Q(1) (dealing with property)	12 years imprisonment from the date of arrest	PG at first instance
5.	Pendakwa Raya lwn Imam Wahyudin bin Karjono dan satu lagi dan kes-kes lain [2017] 10 MLJ 582 (HC)	s 130J(1)(a) (*Bai'ah*, telegram)	12 years imprisonment from the date of arrest	PG at first instance
6.	Public Prosecutor v Jonius Ondie @ Jahalie (HC)	s 130J(1)(b) (support, telegram)	ten years imprisonment from the date of arrest	PG after eight witnesses called

7.	Public Prosecutor v Mustaza Abdul Rahman (HC)	s 130J(1)(b) (support, telegram)	12 years imprisonment from the date of arrest	Full trial
8.	Public Prosecutor v Mustaza Abdul Rahman (HC)	s 130J(1)(a) (*Bai'ah*, telegram)	12 years imprisonment from the date of arrest	Full trial
9.	Azizi bin Abdullah v Public Prosecutor W-05(SH)-218–05 of 2017 (CA)	s 130J(1)(b) (support, telegram)	13 years imprisonment from the date of arrest	PG at first instance
10.	Mohamad Nasuha bin Abdul Razak v Public Prosecutor W-05(H)-404–09 of 2017 (FC)	s 130J(1)(b) (support, telegram)	Ten years imprisonment from the date of arrest	PG at first instance

[40] From the list, we noted that Bukhori bin Che Noor, to whose account the respondent had made the four separate monetary contributions was sentenced to seven years imprisonment from the date of arrest. He had pleaded guilty at first instance. We noted further that as for the other offenders, in *Public Prosecutor v Mustaza Abdul Rahman*, a term of 12 years imprisonment had been imposed after a full trial; while in the case of *Azizi bin Abdullah v Public Prosecutor*, a term of 13 years imprisonment was imposed although he had pleaded guilty at first instance. In the Federal Court decision of *Mohamad Nasuha bin Abdul Razak v Public Prosecutor* W-05(H)-404–09 of 2017 (unreported), a ten year imprisonment was imposed even though the accused had pleaded guilty at first instance to a charge under s 130J(1)(b). The closest in circumstances would be the case of *Public Prosecutor v Jonius Ondie @ Jahalie* where a ten year imprisonment was imposed where the accused changed his plea after eight witnesses had testified.

CONCLUSION

[41] From the submissions of both counsel, the totality of evidence, the change of plea, the public interest and the severity of the offence and for the reasons already discussed, we unanimously thus found that there was appealable error in the exercise of discretion in respect of the punishment that was meted out. We held that a sentence of ten years imprisonment from the date of arrest for each of the charges to run concurrently is adequate and appropriate, and we so ordered.

Order accordingly.

Reported by Dzulqarnain Ab Fatar